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Director
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Via email: consumerlaw@treasury.gov.au

Dear Director

RE: Unfair Trading Practices – Consultation Regulation Impact Statement

AUSVEG welcomes the opportunity to provide a submission to Treasury's consultation on the unfair trading practices (UTPs) through the Consultation Regulation Impact Statement (CRIS).

AUSVEG is the prescribed Peak Industry Body representing the interests of the Australian vegetable, potato and onion industry. AUSVEG is a not-for-profit, member-based organisation that is run by growers, for growers.

AUSVEG represents over 3,600 vegetable producers that account for 3.83 million tonnes of vegetable production with an annual production value of \$5.5 billion in farmgate value and over \$5.7 billion in retail value.

Competition issues have been a contentious subject for Australian vegetable growers for decades, however the lack of competition across Australia's agricultural supply chains is worsening. As market concentration has increased in Australia, vegetable growers have fewer places to buy inputs and source services (such as freight), and fewer places to sell their products, whether it be in the retail sector or processing sector. Unlike many other agricultural commodities the vegetable industry is particularly reliant on the domestic

market, with exports less than 6% of production due to the perishable nature and low value of most fresh vegetables, and therefore the sector also lacks the opportunity to easily divert product into export markets.

In the horticultural sector there are thousands of growers but only four main retailers, dominated by the duopoly – Coles and Woolworths. This dynamic makes growers especially vulnerable to unfair practices because they have little control over the terms of trade and prices for their products. The perishability of the many vegetables further weakens growers' bargaining power, as they are often compelled to accept unfavourable terms to avoid crop losses, product spoilage and to maintain cash flow.

Examples of unfair practices include unilateral variations of supply terms that can significantly impact farmers' incomes, and commercial retribution against suppliers who seek a price increase or who raise concerns about the conduct of the buyer.

Australian Consumer Law (ACL) currently does not have adequate protections against the multiple unfair trading practices that are known to occur in Australia. As outlined in the CRIS, there are a number of examples that cause harm to businesses that are not captured under existing provisions in the ACL. These include practices that:

- Are not misleading or deceptive but still distort consumer or business choice;
- Do not reach the threshold of unconscionable conduct;
- May result in financial or other detriment but relates to:
 - Matters that do not form part of a standard form contract; or
 - Actions relating to entering into terms and conditions, rather than their content.
- Are not a specific practice currently prohibited by the ACL.

AUSVEG encourages the Australian Government to introduce new regulations that outlaw the use of unfair trading practices to prevent the exploitation of market power in Australia's food supply chains.

New Unfair Contract Terms (UCTs) that commenced in November 2023 are a good step forward, however they do not address anti-competitive behaviours in the agricultural supply chain or broader economy. This occurs for two clear reasons. First, UCTs are limited in their applicability to the contents of a contract and therefore cannot capture those behaviours that fall outside of the contract, including behaviour during contractual negotiations and behaviour that occurs once the contract is in force.

Many Australian vegetable growers are forced to negotiate 'supply arrangements' or 'supplier commitments' with the major retailers that are not deemed as contracts. The supplier arrangements commit the grower to provide produce on an annual basis, with a schedule of the amount of product per week and the destination (typically allocated retail

Distribution Centres). However, the actual volumes ordered by the retailer may vary in line with consumer demand, pricing and other factors.

Therefore, whilst the grower may schedule and plant crops around the supply agreement, the actual volume purchased by the retailer may be entirely different. At the time of committing to the supply agreement no price is negotiated, and growers are forced to negotiate this on a weekly basis. Whilst the growers submit their weekly quotation with volumes and price, growers are frequently advised by the retailers that they will not receive any orders unless they reduce their price to a price indicated by the retailers as being the required price to be competitive with other quotes. There is no transparency around this process and for all the growers know, the price they have been advised is entirely fictitious.

Even when a price has been agreed to there is ongoing pressure on growers by the retailers to reduce prices for unscheduled promotions or when the retailers price match. A recent example is when one major retailer dropped the price of a vegetable line and two other retailers forced the same price drop onto their grower-suppliers so the retail prices were matched.

Second, unfair contract terms do not protect against commercial retribution. Due to the regional monopoly conditions in many agricultural supply chains, vegetable growers are unlikely to challenge UCTs due to their reliance on retail or processor companies to provide them with ongoing contracts and supply agreements. As such, challenging UCTs exposes individual growers to commercial retribution through either not offering the farmer a future contract if they pursue legal action, or they may be terminated mid-contract. With no alternate processor in their region, this would have grave consequences for the farm business. This reinforces the need for the introduction of a new regulatory scheme that outlaws UTPs in the Australian economy.

In addition, the ACCC Perishable Agricultural Goods Inquiry identified a number of harmful trading practices by supermarkets present in perishable goods markets, including those for horticultural products, including:

- Contract terms that inefficiently allocate risk, including unreasonable payment terms;
- Harmful use of bargaining power, including changing supply volumes for perishable products at very short notice after they have been agreed;
- Lack of transparency in relation to price and non-price factors;
- Producers making growing and investment decisions with no certainty, including scheduling plantings with no forward price or contract;
- Commercial retribution by supermarkets, including de-listing, contract termination, or reductions in volumes in response to supplier requests for price increases;
- Requiring suppliers who negotiate a cost increase to invest in unrelated cost offsets; and

- Requiring suppliers to disclose confidential financial information or intellectual property during cost increase negotiations.

A survey of Australian vegetable growers in July 2023 indicated more than 34% of growers were considering leaving the industry in the next 12 months. This is due to several key factors, including the inability to pass on input and wage increases, and retailers squeezing growers to accept low prices for their products to combat 'cost-of-living' pressures.

The ongoing pressure on growers to supply product, often below the cost of production, is also stifling innovation, capital infrastructure upgrades, and regional economic confidence.

The behaviour of the major Australian retailers is threatening the food security of Australia. With Australian growers providing over 98%¹ of fresh vegetables to Australian consumers, a significant contraction of growers would lead to vegetable shortages and higher prices at the checkout.

AUSVEG believes that the current competition framework has too much emphasis on the consumer welfare standard, to the detriment of suppliers, and ultimately as suppliers exit the industry, it will be to the detriment of consumers.

To ensure the long-term viability of growers and food security of fresh produce in Australia, AUSVEG in consideration of the options in the CRIS, supports Option 4: the introduction of a combination of general and specific prohibitions on unfair trading practices.

UTPs are currently not effectively covered by Australian consumer law, however the introduction of specific prohibitions on UTPs will strengthen the UTP framework within the consumer law. The addition of a list of specific prohibited practices will ensure the consumer law is comprehensive and directly targets practices known to be unfair and cause significant impact on consumers and small businesses.

Option 4 provides a combined approach and derives benefits from both the general prohibition of UTPs and prohibition of specific activities known to be UTPs. It will provide the greatest level of clarity to business and consumers about what is a UTP and what actions can be taken to challenge the use of these practices.

Option 4 is the most suitable option to effectively address UTPs within the fresh produce sector, with growers currently at the mercy of the Australian retailers who exploit the existing UTP legal framework (or lack thereof).

One of the common complaints about the Australian Food and Grocery Code is the lack of power to penalise and fine offenders. The New Zealand Food and Grocery Code has the provisions to act against both a company and an individual, and the penalties are substantial.

¹ Australian Horticulture Statistics Handbook 21-22, www.horticulture.com.au

Any reform to the UTP framework should include significant penalties for the use of unfair trading practices, in line with recent reforms of unfair contract terms. The reform process must ensure that these penalties should present significant civil and financial penalties. The introduction of financial penalties will allow courts and the Australian Government, through the ACCC, to take clear action against businesses that use UTPs.

Without changes to UTPs, the behaviour of businesses along the supply chain in the position of power (such as retailers and processors) are likely to continue with vegetable growers, and ultimately consumers, bearing the costs as a result of these practices.

As stated previously the economic viability and sustainability of the vegetable industry in Australia is in jeopardy. Increased reliance on imported products, and more expensive domestic product is a realistic outcome for Australian consumers. However, the longer-term ramifications have bearing on the economic wellbeing of rural and regional Australia, combined with declining sovereign capability and an increasingly vulnerable food supply chain.

Australian vegetable growers have managed the vagaries of the markets, the weather, the labour market, and even COVID-19, but they have always managed to supply fresh, high quality, safe produce to Australian consumers. Vegetable growers understand that the highs and lows of the markets are cyclical, however the ongoing tactics of retailers, and the imbalance of power in the grower-retailer relationship is no longer sustainable.

AUSVEG supports the review of the UTP framework and the adoption of Option 4.

For further information please contact Lucy Gregg, General Manager Public Affairs, AUSVEG on [redacted] or [redacted].

Yours sincerely

Michael Coote

CEO, AUSVEG